RECORD NO. 19-4758

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

BRIAN DAVID HILL,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF OF APPELLANT

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Brian David Hill, (the "Appellant") appeals from a final judgment in a supervised release revocation hearing filed October 4, 2019, in the United States District Court for the Middle District of North Carolina by United States District Judge Thomas D. Schroder. The notice of appeal was filed on October 9, 2019. Appeal is authorized pursuant to 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 4(b).

II. STATEMENT OF THE ISSUES

Whether the district court erred by denying Appellant his Sixth Amendment right to trial by jury and/or by finding Appellant guilty by a preponderance of the evidence rather than beyond a reasonable doubt or, in the alternative, whether existing law should be extended and/or modified to find the above.

Whether the district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387.

Whether the law should be extended and/or modified to hold that the district court abused its discretion in denying Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

III. STATEMENT OF THE CASE

On or about June 10, 2014, Appellant plead guilty to a one-count indictment before the Honorable William L. Osteen, Jr., United States Chief Judge for the Middle District of North Carolina for allegedly possessing child pornography in violation of 18 U.S.C. 2252A(a)(5)(B). (JA 5, 24). On November 12, 2014, Appellant was sentenced to time served plus ten (10) years of supervised release.

On or about November 13, 2018, approximately four years after sentencing, a petition for revocation of Appellant's supervised release for allegedly committing a misdemeanor of indecent exposure. (JA 26-27). Appellant was subsequently taken into federal custody from December 22, 2018, until May 14, 2019, when he was released on bond. (JA 17-18).

On September 12, 2019, the district court denied Appellant's motion to continue the hearing until after his underlying criminal trial and the district court conducted a hearing, without a jury, in which the district court made findings of fact and adjudged Appellant guilty of the misdemeanor charge by a preponderance of the evidence, not beyond a reasonable doubt, based on those findings of fact. (JA 35-36). In doing so, the district court heard evidence that Appellant was naked in public and taking photographs of himself out of fear that another person would harm his family if he did not do so. (JA 42-43). The district court also heard that this nudity occurred in between midnight and 2:00 a.m., when few members of the public be

present. (JA 53). The district court did not hear, however, any evidence of Appellant having his dominant theme, or purpose being an appeal to the prurient interest in sex. Nevertheless, the district court sentenced Appellant to nine (9) months of incarceration, which was at the high end of the guideline range. (JA 100-01). The district court gave Appellant credit for time served and ordered him to self-report on December 6, 2019. (JA 101-03). After self-reporting for incarceration, Appellant was quickly released when it was determined that his time served satisfied his entire nine (9) month sentence.

A notice of appeal was filed on October 9, 2019 and, pursuant to the Appellant's request, the undersigned was appointed as new counsel on October 31, 2019. (JA 136, 159).

IV. SUMMARY OF THE ARGUMENT

The district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt, based upon those findings of fact. Alternatively, existing law, as recently modified by the Supreme Court of the United States should be extended and/or modified to find the above.

The district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-

387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person.

This Court should extend and/or modify existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

V. ARGUMENT

A. Standard of Review

A district court's decision to revoke supervised release is reviewed for abuse of discretion *United States v. Padgett*, 788 F. 3d 370, 373 (4th Cir. 2015). The factual findings underlying that revocation are reviewed for clear error. *Id.*

When reviewing the sentence imposed by a district court for in a revocation proceeding reasonableness, this Court reviews the sentence for abuse of discretion. *United States v. Slappy*, 872 F.3d 202, 210 (4th Cir. 2017). Conversely, this Court reviews questions of law in supervised release revocation proceedings *de novo*, including the interpretation of the United States Sentencing Guidelines and the Constitution of the United States. *United States v. Barton*, 26 F.3d 490, 491 (4th Cir. 1994).

B. Argument

i. The district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt.

The district court erred as a matter of law in conducting the revocation hearing without a jury and by making findings of guilt by preponderance of the evidence, rather than beyond a reasonable doubt, based upon those findings of fact. Until recently, it was undisputedly considered constitutionally permissible to revoke supervised release in a bench hearing, without a jury, and to determine guilt by preponderance of the evidence, rather than beyond reasonable doubt, based upon findings of fact by the district court. *See, e.g., United States v. Capley*, 978 F.2d 829, 81 (4th Cir 1992); *United States v. Faulks*, 195 F. App'x 196, 198 (4th Cir. 2006) (unpublished).

However, on June 26, 2019, approximately two and one-half (2 ½) months prior to Appellant's revocation hearing, the Supreme Court of the United States decided *United States v. Haymond*, 139 S. Ct. 2369 (2019).

In *Haymond*, the defendant was initially convicted of possession of child pornography, which is the same initial offense as Appellant. *Id*. at 2373. As in the instant case, Haymond was sentenced to a term of (10) years of supervised release. *Id.* at 2574; (JA 7). Haymond was later caught, while on supervised release, with additional child pornography and a revocation hearing was conducted before a

district judge without a jury and under a preponderance of the evidence standard, not the beyond a reasonable doubt standard. *Id.* Similarly, in the instant case, Appellant appeared before a district judge in a revocation hearing based upon his alleged indecent exposure, without a jury and under a preponderance of the evidence standard. (JA 26-27, 35-36, 120-21).

Both Haymond and Appellant were sentenced to an additional term of incarceration based upon the findings of fact of a district judge, without a jury, by a preponderance of the evidence. *Id.*; (JA 120-21).

Although Haymond's violation invoked the mandatory minimum provision of 18 U.S.C. § 3583(k), whereas Appellant's sentence for his alleged violation fell under 18 U.S.C. § 3583(e), Appellant maintains that the expanded scope of trial by jury and the burden of proof being beyond a reasonable doubt also applies to Section 3583(e) violations, such as this case, either directly through *Haymond* or through an expansion and/or change in existing law.

"Together with the right to vote, those who wrote our Constitution considered the right to trial by jury the heart and lungs, the mainspring and the center wheel of our liberties, without which the body must die; the watch must run down; the government must become arbitrary. Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the

right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375. (internal citations omitted)[1].

Many statements and passages in the Court's opinion strongly suggest that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding. For example, the first sentence of the opinion reads: "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *Haymond*, 139 S. Ct. at 2373.

Unlike the previous statement of ages old law, in a supervised-release revocation proceeding, a judge, based on the preponderance of the evidence, may make a finding that takes a person's liberty, in the sense that the defendant is sent back to prison. The Supreme Court recognized that the Sixth Amendment applies to a "criminal prosecution," and then gave that term a broad definition that encompasses any supervised-release revocation proceeding.

The Court defined a "crime" as any "ac[t] to which the law affixes ... punishment," and says that a "prosecution" is "the process of exhibiting formal charges against an offender before a legal tribunal." *Haymond*, 139 S. Ct. at 2376. The Court, however, uses this definition for the purpose, of declaring that every

1 For the sake of brevity, Appellant will not reproduce the Supreme Court of the United States' eloquent remarks from *Haymond* on the historic and fundamental importance of both the right to trial by jury and that proof of criminal conduct must be beyond a reasonable doubt. Appellant hereby incorporates by reference, as if fully set forth herein, pages 2376 through 2378 of the *Haymond* opinion.

supervised-release revocation proceeding is a criminal prosecution. See *Haymond* 139 S. Ct. at 2379 ("[A] 'criminal prosecution' continues and the defendant remains an 'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed.... [A]n accused's final sentence includes any supervised release sentence he may receive".)

Quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004), the Court states that "a jury must find beyond a reasonable doubt every fact which the law makes essential to a punishment that a judge might later seek to impose." *Haymond*, 139 S. Ct. at 2370. Since a defendant sentenced to incarceration after being found to have violated supervised release is receiving a "punishment," then the Court's statement means that any factual finding upon which that judgment is based must be made by a jury, not by a judge.

While both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. United States*, 570 U.S. 99 (2013), apply only to a defendant's sentencing proceeding and not to a supervised-release revocation proceeding, which has been described at times as a "postjudgment sentence-administration proceedin[g]," the Court states that "the demands of the Fifth and Sixth Amendments" cannot be "dodge[d] by the simple expedient of relabeling a criminal prosecution a ... 'sentence modification' imposed at a 'postjudgment sentence administration proceeding." *Haymond*, 139 S. Ct. at 2379. The meaning of the Court's above statement is clear. A supervised-

release revocation proceeding is a criminal prosecution and is therefore governed by both the Fifth and Sixth Amendments. See *Haymond*, 139 S. Ct. at 2390 ("any accusation triggering a new and additional punishment [must be] proven to the satisfaction of a jury beyond a reasonable doubt"); *Id.* at 2380 ("a jury must find all of the facts necessary to authorize a judicial punishment").

The Court, in summary, posits that parole was constitutional, but supervised release is entirely different. Haymond, 139 S. Ct. at 2381-82. The implication in the above statements is clear enough: All supervised-release revocation proceedings must be conducted in compliance with the Sixth Amendment. The Court hints at where it is heading when it writes: "[O]ur opinion, [does] not pass judgment one way or the other on § 3583(e)'s consistency with *Apprendi*." *Haymond*, 139 S. Ct. at 2382-84, n.7. Section 3583(e), the section under which Appellant was sentenced, sets out the procedure to be followed in all supervised-release revocation proceedings. Therefore, the Court left open the door that provision, the one through which Appellant was sentenced, is not consistent with *Apprendi*, which means that Appellant's proceeding required trial by jury.

There is no clear ground for limiting the *Haymond* opinion only to Section 3583(k). The Court simply let that issue sleep for another day. Today is that day. This Court should recognize the larger paradigm shift which has occurred in the Supreme Court's reasoning, which when applied, protects Appellant from being

sentenced to further incarceration without a jury and requires a beyond a reasonable doubt evidence standard.

ii. The district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person.

The district court erred in finding that the evidence before it was sufficient to find that Appellant violated his supervised release by violating Virginia Code § 18.2-387 because the evidence fails to show that Appellant acted intentionally to make an obscene display or exposure of his person. That statute provides, in relevant part, that "[e]very person who **intentionally** makes an **obscene** display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor." Va. Code § 18.2-387 (emphases added).

"The 'obscenity' element of Code § 18.2–387 may be satisfied when: (1) the accused admits to possessing such intent, *Moses v. Commonwealth*, 611 S.E.2d 607, 608 (Va. App. 2005)(*en banc*); (2) the defendant is visibly aroused, *Morales v. Commonwealth*, 525 S.E.2d 23, 24 (Va. App. 2000); (3) the defendant engages in masturbatory behavior, *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. App. 2000); or (4) in other circumstances when the totality of the circumstances supports an inference that the accused had as his dominant purpose a prurient interest in sex,

Hart, 441 S.E.2d at 707–08. The mere exposure of a naked body is not obscene. *See Price v. Commonwealth*, 201 S.E.2d 798, 800 (Va. 1974) (finding that `[a] portrayal of nudity is not, as a matter of law, a sufficient basis for finding that [it] is obscene')." *Romick v. Commonwealth*, No. 1580-12-4, 2013 WL 6094240, at *2 (Va. Ct. App. Nov. 19, 2013)(unpublished)(internal citations reformatted).

While the evidence may show that Appellant was naked in public, as stated above, nudity, without more, is not obscene under Virginia law. Rather, "[t]he word `obscene' where it appears in this article shall mean that which, **considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex**, that is a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value." Va. Code § 18.2-372 (emphasis added). While Virginia does not appear to have established a clean definition of criminal intent, Black's Law Dictionary defines it as "[a]n intent to commit an actus reus without any justification, excuse, or other defense."

In summary, in order to show that Appellant violated his supervised release by committing the offense of indecent exposure under Virginia law, the government was required to prove, among other things, that Appellant had the intent to display

or expose himself in a way which has, as its dominant theme or purpose, appeal to the prurient interest in sex, as further defined above, without any justification, excuse, or other defense.[2] The government failed to do so. Rather, the government's evidence, presented through its own witnesses, showed Appellant as someone who was running around naked between midnight and 2:00 a.m. and taking pictures of himself because he believed that someone was going to hurt his family if he did not do so. (JA 42-43, 53).

The district court did not hear, however, any evidence of Appellant having his dominant theme, or purpose being an appeal to the prurient interest in sex. For example, there was no evidence of Appellant making any sexual remarks, being aroused, masterbating, or enjoying his conduct, sexually or otherwise. If a person was purposing to expose himself in public because he or she found it sexually arousing, it would be logical that he or she would pick a place and time where he or she would expect to encounter lots of members of the public. Appellant did not do that. Rather, he was running around between midnight and 2:00 a.m. and the witnesses to his nudity were few. Hence, the statements Appellant made to police and his conduct both indicate that, in the light most favorable to the government, he

[2] For the reasons stated above, the government's burden was to prove every element of the offense, including the mens rea, beyond a reasonable doubt. However, even if, *arguendo*, this Court were to find that the government's burden was only a preponderance of the evidence, the government has still failed to carry its burden.

was naked in public while having a psychiatric episode, but without the intent necessary to commit indecent exposure under Virginia law. Consequently, the district court erred, as a matter of law, when it found that Appellant had violated his supervised release by committing the Virginia state law offense of indecent exposure as per Virginia Code § 18.2-387.

iii. This Court should extend and/or modify existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying criminal appeal was completed.

This Court should extend and/or modify existing law to hold that the district court abused its discretion when it denied Appellant's motion to continue the revocation hearing until after the underlying criminal appeal with completed. As stated above, this Court should extend and/or modify existing law to find that Appellant had a constitutional right to a trial by jury and for his guilt to be determined to the beyond a reasonable doubt standard.

An abuse of discretion occurs when the district court demonstrates "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983).

However, if the district court had not wanted to empanel a jury, it could have still protected Appellant's constitutional rights by simply granting Appellant's motion to continue the hearing in order to allow Appellant's pending state court appeal to reach a final decision. (JA 30-36). Had the district court done so, it could

have used the final conviction from the Virginia state court, if the appeal were unsuccessful, as a factual basis for a revocation because Appellant would have, at that point, been determined to be guilty of said underlying offense beyond a reasonable doubt by a jury of his peers. Conversely, if said appeal were successful, then the district court could have dismissed the revocation petition. Therefore, the district court demonstrated an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay by insisting that the hearing proceed that day.

As provided in 18 U.S.C. 3583(e)(4), and discussed at the revocation hearing the district court could have ordered Appellant to remain at his place of residence during non-working hours and/or placed him on electronic monitoring. (JA 103-06). Such an order would have alleviated any public safety concern while Appellant's appeal was ongoing in state court. Therefore, the district court abused its discretion when it denied Appellant's motion to continue, as the district court could have alleviated the basis for this appeal by merely granting the continuance.

VI. CONCLUSION

For the reasons state above, the Appellant urges this Court to vacate the revocation of his supervised release.

VII. REQUEST FOR ORAL ARGUMENT

As this appeal raises important constitutional and statutory interpretation issues in an evolving area of law which could have broad effects on every supervised release revocation hearing, the Appellant requests oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: December 19, 2019

/s/ E. Ryan Kennedy
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 19th day of December, 2019, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 19th day of December, 2019, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Sealed Volume of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

/s/ E. Ryan Kennedy
Counsel for Appellant